

NGUYEN (Migration) [2018] AATA 3084 (14 May 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Thi Kim Phuong NGUYEN

CASE NUMBER: 1607805

DIBP REFERENCE(S): BCC2015/3532874

MEMBER: Justin Owen

DATE: 14 May 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 14 May 2018 at 5:39pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Application made more than 28 days after last substantive visa ceased – Applicant does not meet the relevant Schedule 3 Criteria – Whether compelling reasons exist to waive the Schedule 3 Criteria – Where the applicant provides emotional and physical support for the sponsor's parents – Emotional support can be maintained offshore – Physical support can be provided by various services or other family members – Degree of hardship does not amount to compelling reasons – Decision affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, 820.211(2)(d), Schedule 3, Criterion 3001

CASES

Babicci v MIMA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 12 May 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 26 November 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2). The delegate found that the applicant was not the holder of a substantive visa at the time he lodged the partner visa application. The delegate considered the applicant's request to waive the Schedule 3 criteria, but after considering all the circumstances of the application, the delegate concluded there were not compelling reasons to waive the Schedule 3 criteria.
4. The applicant appeared before the Tribunal on 23 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor De Cong Vu, Cong Diep Vu and Thi Thanh Huong Nguyen. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in this case is whether the applicant meets the Schedule 3 criteria (as attached to this decision), and if not, whether there are compelling reasons for not applying them.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

8. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
9. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.
10. [Information removed].

11. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that she entered Australia unlawfully on or after 1 September 1994.

Criterion 3001

12. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
13. The Tribunal finds that the applicant last held a substantive visa on 10 September 2012 when her subclass 573 student visa ceased. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3.
14. As the Partner visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.
15. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Compelling reasons

16. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
17. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
18. The applicant provided the Tribunal hearing with the historical background of her time in Australia. She stated that she studied a range of courses whilst holding a Student visa including English at Deakin University, a Diploma in Management and had planned to extend this Diploma to a Bachelor degree but had been declined as she had not completed the requisite number of units for the Bachelor degree.
19. [Information removed].
20. The applicant has claimed that she has been in a spousal relationship with the sponsor since July 2013. She told the Tribunal how the sponsor took her to his family home where he met the sponsor's parents. She stated that the family was very warm towards her and it is a close family. The applicant says the sponsor asked her to move into his house with his parents at the end of 2012 while they married the next year. She claims to have lived their continuously since 2013.
21. It was submitted in oral evidence by the applicant that the sponsor's mother is very weak and she is very reliant upon the applicant. The ongoing care and support she provides to the sponsor's mother – and father – has been submitted as a compelling reason for the Tribunal to waive the Schedule 3 criteria. The applicant claims that she and the sponsor's

mother share a lot and their relationship has become very close over the years. The applicant talked about the care she provided to the sponsor's mother when she fell. She claims the sponsor's mother is unwell. A letter from the sponsor's mother's GP was provided dated 14 April 2018 that states the sponsor's mother suffers from falls; multiple joint pain; severe osteoarthritis of the ankles and was totally dependent on her husband for daily care. (T1, Folio.212). The applicant also provided the Tribunal with some historical medical records and correspondence from 2009 concerning ankle, shoulder, neck and joint pain and problems she was facing at that time. (T1, Folio.202-211).

22. The applicant also stated that the sponsor's father is also unwell and needs assistance. She said her father in law had had a fall whilst he also suffered from hypotension and high blood pressure.
23. The sponsor's mother and father each attested to the Tribunal the significant support around the home the applicant provides them. The sponsor's mother said that the applicant provides a wide range of care – from assisting her with cooking, medication, taking her to medical appointments to showering. She said that she is in pain at night and the applicant rubs medical oil to help her deal with her pain. She said that she falls and the applicant looks after her when this happens. The sponsor's mother said without the applicant she didn't know if she could go on. The sponsor's father agreed saying they had nowhere to go without the applicant and would be at a dead-end situation. The sponsor's father in oral evidence agreed, saying the applicant is a nice and gentle individual that is very willing to look after an elderly person like the sponsor's mother. The sponsor's father in oral evidence claimed in 2009 his wife was very sick and intended to commit suicide. He said that she suffered from depression. He said that since meeting the applicant his wife the sponsor's mother had found energy and a reason to live. The Tribunal enquired of the sponsor as to what support the applicant provided to the family. He stated that she helps with cooking and cleaning and generally helped his parents out.
24. The sponsor's mother claimed that her husband previously looked after her but now he was too sick. The sponsor's father agreed, saying he was sick and had suffered from falls. He stated the care he could provide his wife was limited. In terms of care, he stated that you needed someone that was willing to care and look after his wife.
25. The Tribunal accepts that the applicant provides the mother and father of the sponsor with emotional support as well as care and assistance with their household. The Tribunal is of the opinion that she can continue to provide this emotional support whilst she is offshore. There is nothing to impede the parties from keeping in close communication whilst the Partner visa is processed. The Tribunal considers the parties are able to maintain cordial, close and significant relations during this period. The Tribunal does not consider any temporary absence of the applicant and its impact upon the provision of emotional support represents a compelling reason to waive the Schedule 3 criteria.
26. The Tribunal carefully considered the physical hardship and challenges around the home the sponsor's mother and father might face should the applicant depart offshore. The Tribunal asked the sponsor's mother if she received any assistance from anyone else. She said she did not. The Tribunal notes that the sponsor's mother in oral evidence also said that her younger son also lives in Melbourne. The Tribunal enquired if he was able to provide his parents with support. The sponsor's mother replied that his father in law was ill so he had to look after him instead. The Tribunal enquired if she had ever requested any assistance from the Government, welfare or charities. The sponsor's mother replied that she did not because her symptoms appear at night-time. The sponsor's father agreed saying that his wife did not want anyone else to touch her. The sponsor's mother expressed a reluctance to utilise the assistance of strangers. The sponsor's father said he had never applied for or approached anyone for support as he had limited knowledge and was unaware of the

services in the home that might be available to assist his wife. The Tribunal is of the opinion that there is a range of community, charity, welfare and government services available to assist with in-home care and assistance that the sponsor's mother and father could avail themselves of. This is in addition to any support that can be provided by the sponsor – who lives in the same home with his parents – as well as the applicant's younger brother who also resides in Melbourne. The Tribunal does not consider the provision by the applicant of care to the sponsor's mother and father – and the hardship they will allegedly face should she depart offshore whilst her Partner visa application is processed - represents a compelling reason to waive the Schedule 3 requirements.

27. The Tribunal asked the sponsor's mother if her son, given he was residing with her, provided any assistance to her. The sponsor's mother said that he was busy working. Similarly the applicant in oral evidence said her husband the sponsor works a full-time at Linfox in logistics. It was submitted by her that the pressures of his employment means that he does not have the time or capacity to assist his elderly parents and this role has fallen upon the applicant. The sponsor referred to the extensive care and support the applicant provides him and his parents in the family home. He said that she allowed him to focus on his career whilst she looked after himself and his parents. He claims to have built his life around the applicant. He said that without the applicant in Australia he will be stressed. The sponsor's father in oral evidence said that he and the sponsor would not be able to look after the sponsor's mother. The Tribunal accepts the sponsor's oral evidence that he is working hard on his career and the challenges that exist in regards to him assisting his elderly parents. The Tribunal accepts that the sponsor may have to make some sacrifices and make a greater contribution in assisting his parents whilst the applicant is offshore. The Tribunal accepts that he may have to on a temporary basis shift some of his daily attention to the care for his parents as well as his employment. The Tribunal does not consider that these impositions on the sponsor are a compelling reason for it to waive the Schedule 3 criteria.
28. [Information removed].
29. There was a claim by the applicant that the length of time it would take for a Partner visa application to be processed whilst off-shore amounted to a compelling reason to exercise the waiver. The applicant said that she and the sponsor have lots of plans for the future such as purchasing a house and having a family. The Tribunal accepts the evidence that the sponsor feels some anxiety and stress about a temporary separation and the applicant potentially returning to Thailand to lodge a Partner visa application offshore. It is reasonable to expect a level of emotional hardship to be experienced if partners are separated from one another for any extended period of time. This is a common experience for a large number of applicants applying from offshore to migrate to Australia on the basis of their relationship with an Australian citizen or permanent resident. The applicant however has not provided sufficient evidence to demonstrate the severity of the anticipated hardship and how it would differ to that experienced by other couples required to separate whilst they await an offshore application. The Tribunal also notes that if this relationship is genuine, the applicant will be eligible to apply for a Partner visa in the future and any period of separation is likely to be temporary. The Tribunal notes that the applicant is 29 years of age and the sponsor 37 years of age. The Tribunal sees no impediment to the parties being able to start a family – either offshore whilst the application is being processed or onshore in the future if they see fit. The sponsor is hard-working and in good employment. The Tribunal sees no reason why in the future they will not be able to purchase a home together. The Tribunal has considered these claims carefully and does not consider that they represent a compelling reason to waive the Schedule 3 criteria.
30. The sponsor claimed financial hardship would befall him if the applicant had to return to Vietnam to lodge a Partner visa. He said he will be travelling between Vietnam and Australia whilst the visa is being processed which will cause a significant amount of stress. The

Tribunal acknowledges his oral evidence to the hearing that he would travel to Vietnam with the applicant if she were compelled to return offshore to lodge a further Partner visa application and lodge the application with her. The Tribunal acknowledges the extra financial challenges the sponsor and applicant will face if the applicant has to travel off-shore to lodge a Partner visa application. The Tribunal does not though consider this a compelling reason to waive the Schedule 3 criteria. It is reasonable and not unusual to expect some degree of financial sacrifice and changed spending habits in the lodgement of a Partner visa offshore. The Tribunal notes that the sponsor is not compelled to travel offshore to Vietnam whilst the applicant lodges an offshore Partner visa. This is a decision for himself and the sponsor to make. The applicant is not currently in employment so her temporary departure will not impact directly on the sponsor's household income. The Tribunal accepts that given his employment with Linfox he may only be able to spend a limited time away whilst the visa is being processed. The sponsor may have to make some sort of financial contribution to extra assistance at home to assist his parents whilst the applicant is away, but the Tribunal does not consider this onerous, unreasonable or in the circumstances of this case a compelling reason to waive the Schedule 3 criteria.

31. The Tribunal enquired as to why the applicant had waited over two and a half years after her marriage before lodging her Partner visa application. The Tribunal pointed out that she was an unlawful non-citizen at that time. The applicant responded by referring to the care she provided the sponsor's daughter and how his parents treated her like a daughter. The Tribunal is prepared to accept that the applicant enjoys a sound relationship with the sponsor's mother and father. The applicant then went on to state to the Tribunal that when she had married the sponsor, their migration adviser had said to them if they lodged their Partner visa at that time it would be refused by the delegate. The Tribunal also questioned the sponsor as to the delay in the lodgement of a Partner visa application considering they married in July 2013 and the applicant was unlawful. The sponsor said they were concerned that there was not enough evidence at that time to show they were in a genuine and continuing relationship. The inference the Tribunal draws from these responses is that the applicant was attempting to spend further time – in her case a further two years and a half years – in a spousal relationship with the sponsor before lodging her application in order to strengthen her migration case. The Tribunal notes that the applicant was aware that she was an unlawful non-citizen at that time and at no point attempted to regularise her migration status with the Department between September 2012 and the lodgement of the Partner visa application at the end of November 2015. The Tribunal notes that the applicant and sponsor are claiming the length of their relationship with the sponsor as a compelling reason to exercise the waiver. The Tribunal is of the opinion that the applicant has deliberately manufactured an extension to her relationship with the spousal relationship before it is assessed for migration purposes. The applicant has deliberately, in the Tribunal's view, waited for a significant period of time before lodging a Partner visa application in order to allow her to claim that the length of the relationship is both a compelling reason to exercise the waiver and evidence of the genuine and ongoing nature of the relationship. For that entire period of time the applicant remained an unlawful non-citizen and failed to attempt to regularise her migration status. In such circumstances the Tribunal does not consider the claimed length of the relationship between the applicant and the sponsor represents a compelling reason to waive the Schedule 3 criteria.
32. The Tribunal notes from the applicant's written submission that the anxiety of the sponsor and the sponsors parents are submitted as compelling reasons for the Tribunal to waive the Schedule 3 criteria. It was submitted that since the applicant's Partner visa was refused the sponsor was 'no longer a cheerful socially comfortable young man' but had become 'withdrawn and constant worried' by the thought of the applicant having to depart Australia and lodge a Partner visa application offshore. The written submission goes on to refer to the anxiety similarly felt by the sponsor's parents. The submission states that the family feels

the applicant 'has been part of the family for the last four years and it is a heartbreaking situation if (the applicant) were to depart Australia.'

33. The Tribunal accepts the evidence that the sponsor and his parents individually and collectively feel some anxiety and stress about a temporary separation and the applicant potentially returning to Vietnam to lodge a Partner visa application offshore. It is reasonable to expect a level of emotional hardship to be experienced if partners are separated from one another for any extended period of time. This is a common experience for a large number of applicants applying from offshore to migrate to Australia on the basis of their relationship with an Australian citizen or permanent resident. It is also common for extended family members – in this case the sponsor's parents – to feel some emotional hardship. Although emotional hardship can be considered a compelling factor in relation to the Schedule 3 criteria, neither the sponsor nor his parents have provided sufficient evidence to substantiate such claims and demonstrate the severity of the anticipated hardship and how it would differ to that experienced by other couples and other families required to separate whilst they await an offshore application. The Tribunal also again notes that if this relationship is genuine, the applicant will be eligible to apply for a Partner visa in the future and any period of separation is likely to be temporary. In the circumstances of this case, the Tribunal does not consider that the period of temporary separation – and the sponsor and his parents' claimed stress and anxiety about this matter - gives rise to compelling reasons for the waiver.
34. The Tribunal furthermore notes that there is no medical evidence – or claims made - before it that attests to any stress-related emotional or psychological challenges that the sponsor or his parents have been addressing. Given the paucity of independent professional medical opinion concerning the state of mind of the sponsor and his parents, the Tribunal is not compelled to waive the Schedule 3 requirements for a Partner visa for these reasons. The Tribunal notes that there is a wide range of medical, government and community support is available to the sponsor and to his parents to assist them psychologically and emotionally whilst the applicant is offshore if this is necessary. The Tribunal also notes that the sponsor and his parents can avail themselves of a wide number of forms of communication to be in contact with the applicant at any time they see fit.
35. The Tribunal furthermore is not convinced that emotional support can only be provided when the couple or the wider family in the circumstances of this matter reside under the one roof. There is no reason why the same level of support could not have been provided if the applicant was to live and reapply for a Partner Visa outside Australia. That is, the Tribunal is not satisfied that the level of emotional support would be any different if the waiver is not applied. It is not unusual for couples and broader families to live separately for a period of time and that should not preclude the provision of emotional support, if this relationship was genuine. The Tribunal therefore does not consider these circumstances as justifying a waiver of the Schedule 3 criteria.
36. The long term, genuine and continuing nature of the spousal relationship between the applicant and sponsor was articulated in support of the application and in favour of an exercise of the waiver. The genuine nature of their relationship was expressed in the strongest terms by the applicant and sponsor in oral evidence as well as by the sponsor's parents. The applicant through her representative made a written submission to the Tribunal where the long-term relationship she has had with the sponsor was held out as a compelling reason. The applicant pointed out in her submission that she and the sponsor have known each other for over six years and will have been married for almost five years at the time of decision. The applicant submitted as a compelling reason to the Tribunal the long-term relationship she has with her sponsor.

37. The Tribunal has reviewed a wide range of materials the applicant provided the delegate and the Tribunal concerning her relationship with the sponsor. Dating back to 2016 they include photographs of the applicant and sponsor together and with family and friends; statements from the applicant and sponsor; copies of invitations addressed to them both; a Victorian marriage certificate; car repayment and telephone bills; medical and dental documents pertaining to both parties; telephone bills in both their names; ANZ and Bank of Melbourne banking documents in the name of the applicant; Bank of Melbourne statements in the name of both parties; credit card receipts; flight tickets for both parties between Melbourne and the Gold Coast; private health insurance details for the applicant; cosmetic and optometrist bills in the name of the applicant; a bill from their wedding reception in 2013; statutory declarations from family and friends attesting to the genuine and continuing nature of the relationship; gas bills; and movie tickets. The Tribunal accepts on the evidence that the applicant and sponsor are known to each other and there has been a married relationship between the parties during the last five years. The Tribunal accepts that the parties have provided each other with support during their relationship and continue to do so. The Tribunal notes that a criterion for the grant of a Partner visa is that the applicant be the spouse or de facto partner of the sponsor. The definition of both a spousal relationship relevantly requires that the relationship be "genuine and continuing". Accordingly, the existence of a genuine and continuing spousal relationship is itself a criterion for the grant of a partner visa. A compelling reason justifying waiver of the Schedule 3 criteria must involve something in addition to the basic prerequisite criteria for the grant of the visa. A genuine, continuing and exclusive relationship need not be, of itself a compelling reason for not applying the Schedule 3 criteria. The Tribunal has considered this evidence and the circumstances of the parties' claimed relationship and is of the opinion that there is nothing in the individual circumstances of their particular case that should compel the Tribunal to not apply the Schedule 3 criteria. The Tribunal is not satisfied, on the evidence before it concerning the relationship of the sponsor and applicant, that there are compelling reasons not to apply the Schedule 3.
38. The Tribunal has considered the totality of the applicant's circumstances. Having considered the circumstances singularly and cumulatively, the Tribunal is not satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant does not meet cl.820.211(2)(d)(ii).
39. There is no evidence or suggestion the alternative criteria in cl.820.211 (2A), (2B), (5)-(9) apply.
40. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

41. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Justin Owen
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.